BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion into the Operations and Practices of the Conlin-Strawberry Water Co. Inc. (U-177-W), and its Owner / Operator, Danny T. Conlin; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Petition the Superior Court for a Receiver to Assume Possession and Operation of the Conlin-Strawberry Water Co. Inc. pursuant to the California Public Utilities Code Section 855.	Investigation 03-10-038 (Filed October 16, 2003)

ADMINISTRATIVE LAW JUDGE'S RULING ON MOTION FOR DETERMINATION OF APPLICABILITY OF CEQA

This proceeding was initiated on the Commission's own order to determine whether the respondents should be sanctioned because of alleged violations of prior Commission orders in the operation of the Conlin-Strawberry Water Company (Water Company). One of the remedies sought by the Commission's Water Division is authorization to seek the appointment by the superior court of a receivership to undertake management of the water company. (*See* PUB. UTIL. CODE § 855 (2003).)

The possible applicability of the California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000-21177 (2003), was among the topics discussed at the prehearing conference. The resulting Scoping Memo, issued January 9, 2004, provided the parties with an opportunity to file motions or other pleadings concerning the applicability of CEQA to the relief requested in this

proceeding. On January 16, 2004, the Water Division filed a Motion for Determination of Applicability of CEQA, a pleading specifically authorized by Rule 17.2 of the Commission's Rules of Practice and Procedure (Rules). The Water Division argues that CEQA does not apply to this proceeding because it is an enforcement action. Enforcement actions such as this, in the Water Division's view, are categorically exempt (Class 21 exemption) under administrative guidelines adopted for CEQA implementation. (14 CAL. CODE REG. § 15321(a)(2) (2003) (CEQA Guidelines).) The Commission's own rules recognize such a categorical exemption under CEQA enforcement actions. (Rule 17.1(h)(1)(I).)

The Water Company filed its response to the motion on January 30, 2004. The Water Company argues that the Water Division has conceded that the proceeding is a "project" under CEQA. The Water Company further argues that the Class 21 categorical exemption is not available because this is not a "typical enforcement action" since the Water Division seeks to change both the management and physical operation of the company. The Water Company argues that this requested relief is analogous to an eminent domain action, a situation recognized by the courts in some instances as being subject to CEQA. I first address the question of whether the Commission's initiation of a proceeding to secure a receivership constitutes a project under CEQA. I then return to the question of whether the Commission's action, if considered a project, is categorically exempt.

Is the Commission's Effort to Secure a Receivership a Project?

The Water Division's motion allows the Commission the opportunity to conduct a preliminary screening to ascertain whether the anticipated agency action is a project under CEQA. While the decision to pursue a receivership is a discretionary activity, the OII indicates that the Commission seeks only to change

the control and operation of the water system. Nothing in the record indicates that the Commission, by seeking the appointment of a receiver, intends to expand the system or make any major improvement. Based on the record to date, the appointment of a receiver would not cause a direct or reasonably foreseeable indirect physical change in the environment; and the Commission's pursuant of the receivership is not a project under CEQA. (CEQA Guidelines § 15378(a).)

If a Project, is the Proposed Action Categorically Exempt?

The Water Division is correct that, in the event the Commission's pursuant of a receivership is considered a project subject to CEQA, the Commission's action qualifies as a Class 21 categorical exemption for enforcement actions by regulatory agencies. (CEQA Guidelines § 15321.) The exemption covers the regulatory agency's actions in enforcing a law or general rule administered by that agency. In this case, Pub. Util. Code § 855, under which the Water Division seeks the receivership, is just such a law or general rule authorizing enforcement when the water utility has been unwilling or unable to adequately serve customers, has been unresponsive to prior orders of the Commission, or has been abandoned by its owners.

The reported decisions interpreting this categorical exemption are few. One case, *Pacific Water Conditioning Ass'n, Inc. v. City Council,* 73 Cal. App. 3 d 546 (4th Dist. 1977), involved a regional water quality board's cease and desist order against a city to enforce previously adopted waste water standards. The court held that the enforcement order was exempt under CEQA since the order was not a governmental action or project that would have a significant effect on the environment.

The Water Company argues that the Class 21 categorical exempt should not apply in its instances because of the unusual circumstance of the Commission seeking to replace the operator and change the operations of the water system. The Water Company analogizes the situation to eminent domain and cites several cases where an environmental impact report was required in condemnation proceedings. None of these cases supports the Water Company's argument.

In *Burbank-Glendale-Pasadena Airport Authority v. Hensler,* 233 Cal. App. 3 d 577 (2 d Dist. 1991), the airport authority planned an enlarged taxiway, the construction of which required use of one-third of the acquired property. Also, the acquisition made possible "a reasonably foreseeable expansion of airport operations farther to the west and closer to neighboring residential areas." (*Id.* at 584.) In the other case cited by respondents, San Francisco, in an effort to maintain low-cost housing, required developers seeking to convert existing low-cost units to provide equivalent low-cost housing. The municipal ordinance was passed without an environmental impact report. The court of appeals ruled that an EIR was required: "that the ordinance reasonably portends possible future environmental impacts flowing from the cumulative effect of probable replacement construction projects seems undeniable." *(Terminal Plaza Corp. v. City and County of San Francisco,* 177 Cal. App. 3 d 892, 905 (1st Dist. 1986).)

Both these cases are markedly different from the circumstances in the present case. In *Airport Authority* and *Terminal Plaza,* a government agency was taking an action that reasonably would result in construction and a direct or indirect change in the environment. In seeking a receiver for the water system, the Commission's action will not cause such direct or indirect effect on the environment. Indeed, based on the existing record, the Commission seeks only

to have the water system operated in the manner previously authorized by the Commission when it issued a certificate of public convenience and necessity for the system.

Neither party cited *City of San Jose v. Great Oaks Water Co.*, 192 Cal. App. 3d 1005 (1st Dist. 1987), but it is also relevant to this issue. Plans were being developed to supply water and other utilities to a redeveloped industrial area. While the water utility was seeking permission from the Commission, the city substituted itself for the utility as the water provider; but the city did not prepare a subsequent or supplemental EIR. The court held that the city's decision to substitute itself for the utility substantially changed the nature of the project because the sources of the water supply for the project also changed. An EIR should have been prepared. The present situation is distinguishable as there is no indication that a change in the operator will result in a physical change in the environment, such as utilization of a new source of water.

The Commission decisions cited by the Water Company also do not help its position. In *In re Lodi Gas Storage*, D.03-02-071, 2003 Cal. LEXIS 133 (2003), the Commission appropriately made a preliminary inquiry into potential environmental effects (as we are doing here) but determined that the facility, after a change in ownership, would continue to be developed and operated as previously authorized by the Commission. (*Id.* at *25.) Another decision cited by the Water Company reached a similar result. *See In re Wild Goose Storage, Inc.*, D.03-06-069, 2002 Cal. PUC LEXIS 975 (2003) (Commission review of indirect change in control will not result in significant environmental effect as the gas storage project continues to be developed as previously approved by the Commission). These cases indicate that a change of ownership or control, absent

a showing of some change in the physical environment, does not require environmental review.

The other Commission decisions cited by the Water Company are not relevant to the environmental consequences of a change in control. *See In re MLP Limited Partnership*, D.90-08-024, 1990 Cal. PUC LEXIS 1532 (1990) (construction of cellular tower on existing building subject to categorical exemption covering minor modifications of existing structure; transfer of control incidental to CEQA question); *In re Yerba Buena Water Co.*, 27 CPUC 2 d 546 (1988) (Commission approves transfer of control after applicant withdraws request to expand water system by 85 acres because of inadequate environmental information); *In re Napa Cellular Telephone Co.*, 26 CPUC 2d 339 (1987) (Commission issues Negative Declaration after finding that construction of two new cellular sites would not result in significant environmental effects; issuance of stock is unrelated to this question).

Based on the foregoing, **IT IS RULED** that:

1. Nothing in the record to date indicates that the Commission's efforts to secure the appointment of a receivership, under Pub. Util. Code § 855, for the Colin-Strawberry Water Co. will result in a direct or reasonably foreseeable indirect physical change in the environment.

2. The Commission's efforts to secure the appointment of a receivership, under Pub. Util. Code § 855, for the Colin-Strawberry Water Co. is not a project under the California Environmental Quality Act.

3. Even if the Commission's efforts to secure the appointment of a receivership were determined to be a project, the Commission's actions would be categorically exempt as a Class 21 exemption under 14 Cal. Code Reg. § 15321.

4. The Water Division's Motion for Determination of Applicability of California Environmental Quality Act is granted.

5. Either party may renew the motion at trial if the evidence indicates that this ruling should be reconsidered. Otherwise, these determinations will be set forth in the Proposed Decision in this proceeding

Dated March 22, 2004, at San Francisco, California.

/s/ JOHN E. THORSON
John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling on Motion for Determination of Applicability of CEQA on all parties of record in this proceeding or their attorneys of record. In addition, service was also performed by electronic mail.

Dated March 22, 2004, at San Francisco, California.

/s/ FANNIE SID
Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.